Supreme Court, U.S.
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No. 87-1245

In The
Supreme Court of the United States
October Term, 1987

TEXAS MONTHLY, INC.,
Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" unconstitutionally discriminates in the taxation of periodicals based on content under this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987).

2. Whether a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" is invalid as violative of the Establishment Clause of the First Amendment.

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No. .....

In The

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TEXAS MONTHLY, INC.,

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vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JURISDICTIONAL STATEMENT

Texas Monthly, Inc., the appellant,[1] appeals from the final judgment on rehearing of the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin, dated May 27, 1987. That judgment held that Section 151.312 of the Texas Tax Code, which exempts from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of

[1]Appellant is a wholly-owned subsidiary of Mediatex Communications Corporation. Texas Monthly Press, Inc., Mediatex Development Corporation and Mediatex Broadcasting Corporation are appellant's affiliated companies. Appellant has no subsidiaries and no other parent companies or affiliates.

writings promulgating the teaching of the faith," does not discriminate in the taxation of periodicals based on content in violation of the First and Fourteenth Amendments to the United States Constitution nor does it violate the Establishment Clause of the First Amendment.

OPINIONS BELOW

The opinion of the Texas Court of Appeals on rehearing, which appears in the appendix hereto, p. App. 1, *infra*, is reported at 731 S.W.2d 160 (Tex. App.—Austin 1987, writ ref'd n.r.e.). The original opinion of the Texas Court of Appeals dated March 18, 1987, which was subsequently withdrawn, is not reported. It is reprinted in the appendix hereto, p. App. 23, *infra*.

The final judgment and the findings of fact and conclusions of law of the district court are not reported. They are reprinted in the appendix hereto, pp. App. 42 and 46, *infra*, respectively.

JURISDICTION

The original judgment of the Court of Appeals was entered on March 18, 1987. See p. App. 41, *infra*. Motions for rehearing and rehearing en banc were timely filed. The motion for rehearing en banc was overruled on May 6, 1987. See p. App. 50, *infra*. The motion for rehearing was overruled on May 27, 1987, the Court of Appeals with-

drawing its original opinion, substituting a new opinion and entering judgment on motion for rehearing. See p. App. 48, *infra*. A timely filed second motion for rehearing was overruled on June 24, 1987. See p. App. 51, *infra*.

Appellant timely filed an application for writ of error with the Texas Supreme Court, which application was refused on September 23, 1987 with the notation, no reversible error. See p. App. 52, *infra*. A motion for rehearing was entertained and overruled on October 28, 1987. See p. App. 53, *infra*.

A notice of appeal to this Court was timely filed in the Texas Court of Appeals on December 3, 1987. See p. App. 54, *infra*. This appeal is properly taken from the Texas Court of Appeals and not the Texas Supreme Court. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 151.312 of the Texas Tax Code provides:

> Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith are exempted from the taxes imposed by this chapter.

STATEMENT OF THE CASE

This is an appeal from a decision of a Texas Court of Appeals holding that a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" does not unconstitutionally discriminate in the taxation of periodicals based on content under this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987), nor violate the Establishment Clause of the First Amendment.

Effective October 2, 1984, the Texas legislature repealed an existing broad exemption from state sales tax for magazine subscription sales.[2] Remaining in effect,

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[2]This exemption was reenacted by the Texas legislature effective October 1, 1987, and appellant's subscription sales are thus currently exempt from state sales tax. Tax payments for the period the tax was in effect remain in controversy.

however, was an exemption for certain periodicals of a religious nature. No other magazines were exempted.

Appellant publishes *Texas Monthly* magazine, a monthly general interest magazine with circulation of approximately 280,000. *Texas Monthly* magazine features articles on a vast array of subjects, including religion. Appellant is not, however, a "religious faith" nor does its magazine consist wholly of writings promulgating the teaching of a religious faith. Consequently, appellant was required to collect and remit to the State sales tax on its subscription sales beginning October 2, 1984.

In 1985, appellant paid, under protest, sales taxes totalling $149,107.74 to the State. Accompanying each payment was a letter setting forth the grounds for protesting the tax. One of the grounds stated was that Section 151.312, exempting from the sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith," resulted in discriminatory taxation of periodicals based on content in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Appellant filed suit in the district court of Travis County, Texas, 345th Judicial District, seeking refund of the taxes paid under protest, stating as a basis therefor the unconstitutional discrimination in taxation of magazines based on content. The district court entered judgment in favor of appellant in the amount of $149,107.74, plus interest. P. App. 43, *infra*. The court held Section 151.312 of the Texas Tax Code unconstitutional "because it constitutes an unlawful discrimination based on the con-

tent of [appellant's] publication in violation of its rights under the First and Fourteenth Amendments of the U.S. Constitution." P. App. 42; see also Findings of Fact and Conclusions of Law, p. App. 47.

Appellees brought an appeal in the Court of Appeals for the Third Supreme Judicial District of Texas, at Austin. A majority of the three-judge panel of the Court of Appeals reversed the judgment of the district court and rendered judgment for appellees, upholding the constitutionality of Section 151.312. The court held that Section 151.312 did not unconstitutionally discriminate between periodicals based on content. The Texas court distinguished this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987), in which the Court struck down a state sales tax scheme that taxed general interest magazines but exempted "religious, professional, trade and sports journals." The Texas court, ignoring this Court's discussion of content-based discrimination in *Arkansas Writers' Project*, limited that case to situations in which: (i) a tax treats the press differently from other enterprises, or (ii) a tax targets a small group within the press as a whole. The Court of Appeals further held that Section 151.312 did not unconstitutionally favor religion in violation of the Establishment Clause of the First Amendment. The dissenting judge would have held the differential taxation of religious and other periodicals unconstitutional on Establishment Clause grounds.

Appellant reiterated its First and Fourteenth Amendment claims, including a claim that Section 151.312 violated the Establishment Clause, in its application for writ of error filed in the Texas Supreme Court. The Texas

Supreme Court refused the application for writ of error with the notation, no reversible error.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Texas sales tax scheme unconstitutionally discriminates between periodicals based on content

The decision of the Texas Court of Appeals leaves standing a statutory sales tax scheme that grants or withholds a tax benefit based on a publication's *content*. This tax scheme offends the First and Fourteenth Amendments[3] and conflicts with recent decisions of this Court.

This case tests the limits of this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987). In *Arkansas Writers' Project*, the Court struck down a state sales tax scheme that taxed general interest publications but exempted "religious, professional, trade and sports journals." The Court held that the tax targeted a small group within the press and was thus unconstitutional under the Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). The Court further held that:

> Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between maga-

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[3]Appellant's First Amendment claims are necessarily entwined with interests arising under the Equal Protection Clause. The discussion below, in line with recent decisions of this Court, analyzes the Texas sales tax scheme primarily in First Amendment terms.

> zines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. . . .
>
> If articles in *Arkansas Times* were uniformly devoted to religion or sports, the magazines would be exempt from the sales tax under § 84-1904(j). However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined that the magazine's sales may be taxed. In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed . . . ." *FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 104 S.Ct. 3106, 3119, 82 L.Ed.2d 278 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press. *See Regan v. Time, Inc., supra*, at 648, 104 S.Ct., at 3266.

107 S.Ct. 1727-28. *Arkansas Writers' Project* and a long line of decisions from this Court make clear that the First Amendment will not tolerate discrimination based on content. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984) (statute prohibiting noncommercial television and radio stations from editorializing unconstitutional as based on content of message); *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (statute limiting use of photographs of paper currency to "philatelic, numismatic, educational, historical or newsworthy" purposes unconstitutionally permits government to discriminate on basis of content of message); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (exemption from ban on picketing for labor disputes unconstitutional restriction based on content).

The Texas Court of Appeals, in analyzing the constitutionality of the Texas sales tax scheme which exempts

only "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith," ignored this Court's condemnation of content-based discrimination set forth so clearly in *Arkansas Writers' Project*. The Court of Appeals instead read that case as applying only to situations in which (i) a tax treats the press differently from other enterprises, or (ii) a tax targets a small group within the press as a whole. The Texas Court effectively reduced to dictum this Court's holding in *Arkansas Writers' Project* that taxation based on a publication's content violates the First Amendment. But if the Texas Court were correct in its conclusion that this Court's discussion of content-based discrimination was mere dictum, there would have been no need for plenary review in *Arkansas Writers' Project*. Summary reversal on the basis of *Minneapolis Star* would have been appropriate, given that case condemned the two situations identified by the Texas Court of Appeals.

Rather than examine cases explicitly addressing content-based discrimination, the Texas Court of Appeals instead relied on this Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), holding that failure to subsidize a fundamental right did not violate the First Amendment. The Texas court did so in spite of this Court's clear statement in *Regan* that the issue of content-based discrimination was not presented for review. 461 U.S. at 548 ("veterans' organizations . . . are entitled to receive tax deductible contributions regardless of the content of any speech they may use"); 461 U.S. at 551 (concurring opinion) ("discrimination between veterans' organizations and charitable organizations is not based on the content of their speech"). The Texas tax scheme in

specific and unambiguous terms requires the State to examine a publication's content to determine the availability of the exemption.

The Texas Court of Appeals' decision shifts to the appellant the burden to prove that the exemption applicable to religious publications infringes on appellant's constitutional right of free speech. The decision conflicts with decisions of this Court in *Minneapolis Star* and *Arkansas Writers' Project*. In *Minneapolis Star* this Court stated that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." 460 U.S. at 582. In *Arkansas Writers' Project*, the Court held that:

> *Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines.* In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

107 S.Ct. at 1728 (emphasis supplied).

Texas has failed to prove "a compelling state interest" and to demonstrate that the statute is "narrowly drawn" to achieve that interest. Appellees argued below that the exemption of religious publications is necessary to avoid impermissible state entanglement under the Establishment Clause. While the State's goal is worthy, its method is faulty. The exemption requires the State to determine whether the publisher is a "religious faith" and to examine the content of each publication to determine whether it is taxable or exempt. It is the exemption, and not the tax, that gives rise to entanglement.

II. The exemption from tax for religious periodicals constitutes a law "respecting an establishment of religion"

Section 151.312 of the Texas Tax Code exempts from sales tax "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" in violation of the Establishment Clause. The decision of the court below, upholding the exemption as constitutional, attacks the time-honored and constitutionally mandated separation of church and state.

This Court has created a three-part test to determine whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Texas statute fails in all three respects. *See Edwards v. Aguillard*, 107 S. Ct. 2573 (1987).

First, there is no secular legislative purpose for the statute. Appellees asserted in the courts below a secular purpose of avoiding entanglement with religion.[4] Yet it is clear that the State is not *required* to exempt all activities of religious groups from taxation. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). Indeed, sales tax here is easily calculated on the basis of sales price regard-

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[4]Appellees, however, have offered no citation to the exemption's legislative history to support this assertion.

less of the identity of the seller. It is the exemption, and not the tax, which gives rise to examination and inquiry about religious faith and religious teaching. It is the exemption that creates entanglement.

Second, the exemption for religious periodicals advances religion because it singles out religion to receive a benefit not available to other charitable causes. This preference is far more restrictive than the broad exemptions considered by this Court in *Walz v. Tax Commission*, 397 U.S. 664, 672-73 (1970), in which the Court upheld a tax exemption granted to numerous "nonprofit, quasi-public corporations" that foster "moral and mental improvement" of the community at large. *See also Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973) ("narrowness of the benefited class an important factor"); *Gillette v. United States*, 401 U.S. 437, 454 (1971) (tax exemptions, like those in *Walz*, permissible "so long as an exemption is tailored broadly enough that it reflects valid secular purposes").

Third, the statute on its face requires excessive government entanglement with religion. The exemption requires the State to determine (i) whether the publisher or distributor is a "religious faith" and (ii) whether the contents of the publication consist "wholly of writings promulgating the teaching of the faith." As in *FCC v. League of Women Voters* and *Arkansas Writers' Project*, "enforcement authorities must necessarily examine the content of the message that is conveyed. . . ."

Appellees sought below to avoid the entanglement issue by offering testimony of the current supervisor for sales tax policy in the Comptroller's office that she allows

an organization that qualifies as a "religious organization" under the general eleemosynary activities exemption, Section 151.310 of the Texas Tax Code, to claim exemption under the religious writing exemption, Section 151.312, for anything it publishes. This informal construction has never been issued as a regulation or rule by the Comptroller, whose published rules essentially repeat the statutory language of Section 151.312. 34 Tex. Admin. Code § 3.299(d); p. App. 59, *infra*. The majority of the Texas Court of Appeals found that this testimony could save the statute. But the exemption clearly requires a governmental official to evaluate the practices of the group seeking the exemption to determine whether it is a "religious faith." The tax official is also required to read what is written to see if it conforms to the teachings of that faith. A statute requiring more entanglement is difficult to imagine. If a court is prohibited by the First Amendment from deciding ecclesiastical questions, a state official certainly is prohibited from doing so. *See Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969).

But even assuming the practice of the tax supervisor holding that position at the time of trial is binding on the State,[5] it does not save the statute from unconstitution-

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[5]Appellant asserts it is not binding under Texas law. Departmental practice by Texas administrative agencies "affords no basis for practices which are contrary to the plain meaning of statutes." *Brown Express, Inc. v. Railroad Commission*, 415 S.W. 2d 394, 397 (Tex. 1967). Moreover, the State is not estopped from collecting taxes lawfully due by statements of its employees, or even by adopted rules. *Central Power & Light Co. v. State*, 165 S.W.2d 920, 923 (Tex. Civ. App—Austin 1942, writ ref'd); *Bullock v. Ensearch Exploration, Inc.*, 614 S.W.2d 215, 218 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

ality. Under the State's interpretation, the statute confers a special benefit only on religious organizations and achieves no other purpose. Such a construction renders the statute unconstitutional under the second prong of the *Lemon* test.

CONCLUSION

The judgment below upholding the exemption from taxation of religious publications based on content is clearly contrary to decisions of this Court and should be summarily reversed and sent back to the Texas Court of Appeals to award a refund to appellant of taxes paid under protest. Alternatively, this appeal should be awarded plenary review.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

ON MOTION FOR REHEARING

NO. 14,692

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,

APPELLANTS

vs.

TEXAS MONTHLY, INC.,

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT, NO. 378,384, HONORABLE JOE B. DIBRELL, JR., JUDGE

The opinion handed down by this Court on March 18, 1987, is withdrawn and this opinion is filed in its place.

Appellee, Texas Monthly, Inc., sued the Comptroller of Public Accounts and others in the district court of Travis County seeking recovery of sales taxes paid under protest. After trial to the court, the district court rendered judgment that Texas Monthly recover $149,107.74. This Court will reverse the judgment.

Texas Monthly publishes a general interest magazine on a monthly basis. Effective October 2, 1984, the sales of its magazine became subject to the sales tax. Tex. Tax Code

Ann. § 151.051 (Supp. 1987). Texas Monthly paid, under protest, $149,107.74 which sum represented the tax on the sale of its magazine between January 21, 1985 and December 18, 1985.

Texas Monthly's suit for refund was predicated upon the fact that certain publications are exempted from payment of the sales tax. Tex. Tax Code Ann. § 151.312. That section provides:

> Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religion or religious faith are exempted from the taxes imposed by this Chapter.

In its trial petition, Texas Monthly pleaded that:

> Section 151.312 exempts from the sales tax religious periodicals. Such an exemption constitutes an unlawful discrimination based on the content of a publication and thus violates Plaintiff's rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article 1, § 8 of the Constitution of Texas.

The district court's judgment declared § 151.312 unconstitutional "because it constitutes an unlawful discrimination based on the content of [Texas Monthly's] publication in violation of its rights under the First and Fourteenth Amendments of the U.S. Constitution and Article VIII § 1 of the Texas Constitution. . . ."

Although the trial petition and the judgment are not entirely clear, the Comptroller and Texas Monthly in their briefs and oral argument took the position that the district court's judgment was grounded upon the premise that the § 151.312 exemption violated the equal protection and free

speech clauses of the First and Fourteenth Amendments to the Constitution of the United States and the equal and uniform clause of Article 8 § 1 of the Constitution of Texas. In its brief, Texas Monthly discusses the establishment clause of the First Amendment but only as a part of its equal protection analysis.

Under point of error one, the Comptroller first asserts that the district court erred in concluding that § 151.312 violated the equal protection clause of the United States Constitution and the equal and uniform clause of the Texas Constitution. We agree.

It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Equal protection does not impose on a state any rigid equality of taxation. Inequalities which result from singling out one particular class for taxation or exemption infringe no constitutional limitation. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1936). Like considerations govern exemptions from the operation of a tax imposed on the members of a class. The legislature is not bound to tax every member of a class or none at all. The legislature may make rational distinctions of degree having a rational basis. Carmichael v. Southern Coal & Coke Co., *supra;* Hurt v. Cooper, 110 S.W.2d 896 (Tex. 1937); American Transfer & Storage Co. v. Bullock, 525 S.W.2d 918 (Tex. Civ. App. 1975, writ ref'd). The exemptions, when subjected to judicial scrutiny, must be presumed to rest on a rational basis if any state of facts would support such basis. Carmichael v. Southern Coal & Coke Co., *supra*. Indeed, it is said that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimina-

tion against persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." Madden v. Kentucky, 309 U.S. 83 (1940).

In its effort to meet this burden, Texas Monthly suggests that the § 151.312 exemption constitutes a law "respecting an establishment of religion," in violation of the United States Constitution,[1] and therefore is unsupported by any legitimate basis.

The United States Supreme Court has created a three-part test to aid in determining whether a statute violates the establishment clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). "Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." Walz v. Tax Commission, 397 U.S. 664, 669 (1970). Applying this criteria, this Court concludes that § 151.312 does not violate the establishment clause. Furthermore, we are of the view that the classification established by this tax exemption has a rational basis and, accordingly, does not deny appellee equal protection of the law.

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[1] United States Const. amend. I states in part: "Congress shall make no law respecting an establishment of religion . . . . . "

The secular purpose served by a tax exemption for religious organizations was described in *Walz*, *supra*. In *Walz* the Supreme Court reasoned that such a tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce *the desired separation insulating each from the other*." *Id.* at 676 (emphasis supplied).

Furthermore, the opinion in *Walz* demonstrates that the tax exemption at issue does not have the primary effect of advancing or inhibiting religion. To the contrary, the effect of religious tax exemptions such as § 151.312 is to permit religious organizations to be independent of government support or sanction. Although *Walz* recognized that "[g]ranting tax exemptions to churches necessarily operates to afford [them] an indirect economic benefit," the Court concluded that

> [t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state . . . .

Id. at 674-75.

Nor does the fact that *Walz* involved an exemption granted to other "nonprofit, quasi-public corporations," as well as to religious groups, distinguish it from this appeal. Although the broader based exemption in *Walz* provided a clearer case of non-sponsorship than is here present, the *neutrality* toward religion effected by the grant of an exemption for religious periodicals is just as evident. To discover an advancement of religion in this statutory scheme is to turn the intent and effect of § 151.312 on its head.

Finally, this Court concludes that § 151.312 does not excessively entangle the state in religious activities and, accordingly, the statute meets the third prong of the *Lemon v. Kurtzman* test. Once again, we refer to *Walz* as authority for our view. In *Walz* the Court noted that, generally, the grant of an exemption to religious organizations leads to lesser involvement by the State than does taxation. Nevertheless, "[i]n analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675. This analysis involves examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon, supra* at 615.

To the extent § 151.312 creates entanglement, it creates entanglement between government and institutions with purely religious purposes. We are not faced, therefore, with the difficulties presented when the government attempts to limit its intrusion to the secular endeavors of a religious organization—for example, where government attempts to provide aid for the non-religious curriculum of sectarian schools and yet creates excessive entanglement by oversight measures intended to insure that the aid is not directed to religious purposes. *See Lemon, supra;* Meek v. Pittenger, 421 U.S. 349, 372 (1975). Accordingly, our focus is on the nature of the State's aid and the relationship between the State and religious publishers that results from the aid.

The aid at issue is, of course, the indirect subsidy provided by the tax exemption to religious periodicals. No affirmative action by state government is necessary to bestow this benefit. Due to its passive nature, the tax exemption does not create the appearance of an ongoing partnership between the State and religion presented by direct aid. More important, the exemption is administered in such a manner that "official and continuing surveillance" by the government is avoided.

Wanda Hutcheson, supervisor for sales tax policy in the Comptroller's Office, testified that religious publishers may qualify for an exemption by making a one-time showing that they are a bona fide religious organization under Tex. Tax Code Ann. § 151.310. Hutcheson further testified that "we leave it to [the organization] to decide whether or not it's . . . a publication that teaches their faith."

The Comptroller's application of § 151.312 in no manner resembles the "comprehensive, discriminating, and continuing state surveillance" which confronted the Supreme Court in *Lemon*. *Id.* at 619. In *Lemon*, the State had conditioned its direct aid to nonpublic schools with "pervasive" restrictions and a continuing right to inspect and audit school records. In contrast, our record demonstrates that the exemption is administered with a minimum of church-state entanglement and with an eye toward the goal of state neutrality codified in § 151.312 and elaborated in *Walz*.

Because the record in this appeal reveals "no realistic likelihood" that § 151.312 is enforced in such a way as to allow impermissible entanglement, this Court concludes that the Comptroller has met the third prong of the *Lemon*

test. *See* Hunt v. McNair, 413 U.S. 734, 747-48 (1973) (statute was constitutional where administrative scheme negated possibility that breadth of statute would lead to excessive entanglement).

The policy of neutrality toward religion embodied in § 151.312 provides a rational basis for the exemption and defeats any claim that the exemption violates the establishment clause. Accordingly, we conclude that § 151.312 does not deny appellee equal protection of the laws, nor does it violate the equal and uniform clause of the Texas Constitution.

Also under its first point of error, the Comptroller asserts that the district court erred in concluding that the § 151.312 exemption violated the free speech clause of the First Amendment. We agree.

This issue is controlled by the holding of the United States Supreme Court in Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983). *Regan* involved the validity of Internal Revenue Code provisions which allowed contributions to tax exempt organizations to be tax deductible only if the organization did not engage in lobbying. Taxation With Representation claimed the denial of this tax benefit was an "unconstitutional condition" on its exercise of free speech through lobbying. The Supreme Court rejected this claim, stating that "[t]his Court has never held that Congress must *grant a benefit* such as [Taxation With Representation] claims here to a person who wishes to exercise a constitutional right." *Id.* at 545 (emphasis supplied). In short, the Supreme Court held that the failure of the State to *subsidize* speech does not significantly interefere with First Amendment rights.

The same logic applies to § 151.312 of the Tax Code. The legislature has chosen to grant a tax benefit to religious publications. However, Texas Monthly has not shown that the legislature's failure to grant this benefit to other types of publications has "coerced" them into restricting their right of free speech. *Cf.* Speiser v. Randall, 357 U.S. 513 (1958). The first point of error is sustained.

On motion for rehearing, Texas Monthly contends that the opinion of the Supreme Court of the United States in Arkansas Writers' Project, Inc. v. Ragland, No. 85-1370, U.S. Sup. Ct., April 22, 1987 (not yet reported) is dispositive of its claim that § 151.312 violates its right of free speech. Texas Monthly's position is predicated on a misinterpretation of *Ragland*.

In *Ragland*, the Supreme Court identified two impermissible types of discrimination against the press:

(1) a tax which treats the press differently from other enterprises;

(2) a tax which targets a small group within the press as a whole.

The Supreme Court determined that the tax exemption in *Ragland* was so broad that it had the effect of singling out a very small group of magazines for *taxation*. This appeal, to the contrary, presents the opposite situation. The great mass of publishers remain subject to the sales tax. The legislature has rationally determined to *exempt* religious periodicals as a means of furthering the separation of church and state. Neither of the situations deemed objectionable by the Supreme Court in *Ragland* is presented in this appeal. As stated in the original opinion,

this appeal falls within the Supreme Court's holding in *Regan v. Taxation With Representation of Washington, supra.*

Texas Monthly points out further that this Court failed in the original opinion to address the issue of whether the tax exemption at issue violates the free speech provisions of the Texas Constitution, Tex. Const. Ann. art. 1, § 8 (1984). This Court has discovered no Texas authority addressing this issue. Texas Monthly's motion for rehearing relies almost entirely on analysis of federal opinions to support its position that Article 1, § 8 has been violated. Moreover, Article 1, § 8, as it respects limitations on the *government's* right to restrict speech, is stated in terms practically identical to the free speech clause of the First Amendment.

Under these circumstances, this Court will rely on federal law for guidance, *See* Jones v. Memorial Hospital System, 677 S.W.2d 221 (Tex. App. 1984, no writ). We conclude that the analysis set forth in *Regan v. Taxation With Representation, supra,* applies with equal force to Texas Monthly's challenge under Article 1, § 8. Accordingly, we sustain the Comptroller's point of error number one, as it relates to the district court's conclusion that § 151.312 violates Article 1, § 8 of the Texas Constitution.

In its prayer for relief, Texas Monthly, of course, asked that this Court affirm the district court's judgment. If, however, this Court concluded that the district court erred respecting § 151.312, Texas Monthly then requested that we remand the cause to district court for its consideration of issues raised but not there determined.

At oral submission, the Court inquired of counsel whether Texas Monthly had preserved its complaint concerning the issues not determined by the district court. By way of answer counsel requested, and obtained, leave to file a post-submission brief.

It is true that Texas Monthly pleaded that it was entitled to recovery of the taxes based upon one of several grounds. It is likewise true that the district court predicated its judgment upon only one such ground—the claimed unconstitutionality of § 151.312. Texas Monthly, however, did not complain in district court of the court's failure to consider and pass on its other asserted grounds of recovery, nor did it assert any such complaints by cross-points in this Court.

The trial court, of course, should be afforded an opportunity to correct any errors that it might have made in the judgment. Accordingly, to complain of the judgment on appeal, an appellee is required to bring those errors to the trial court's attention in some manner whether by filing exceptions to the judgment, notice of appeal, motion for new trial, or other. West Texas Utilities Co. v. Irvin, 336 S.W.2d 609 (Tex. 1960); Saenz Motors v. Big H. Auto Auction, Inc., 653 S.W.2d 521, 526 (Tex. App. 1983), *aff'd* 665 S.W.2d 756 (Tex. 1984); State Bar of Texas, Appellate Procedure in Texas § 15.16 at 351 (2nd ed. 1979). *See* Luna v. Southern Pacific Transportation Co., 724 S.W.2d 383 (Tex. 1987).

Contrary to appellee's argument in its motion for rehearing, the fact that this Court granted appellee leave to file a post-submission brief does not somehow supply

the missing trial court predicate for the assertion of cross-points in this Court nor does it cure appellee's failure to complain by cross-points in this Court of the trial court's failure to rule on its additional grounds of recovery.

Accordingly, Texas Monthly waived any right it may have had to require the district court to consider and pass on its other grounds of recovery. State Bar of Texas, Appellate Procedure in Texas § 15.16 at 351 (2nd ed. 1979).

The judgment of the district court is reversed and judgment is here rendered that Texas Monthly take nothing.

/s/ Bob Shannon
Chief Justice

[Before Chief Justice Shannon, Justices Brady and Carroll]

Reversed and Rendered on Motion for Rehearing

Filed: May 27, 1987

[Publish]

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 14,692

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,

APPELLANTS

vs.

TEXAS MONTHLY, INC.,

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT, NO. 378,384, HONORABLE JOE B. DIBRELL, JR., JUDGE

DISSENTING OPINION

I respectfully dissent. I am particularly troubled by the impermissible intrusion of the State into religious affairs mandated by the *express terms* of § 151.312. Before allowing an exemption under § 151.312, the Comptroller must not only determine whether a bona fide "religious faith" is distributing the periodical, he must also assess whether the publication consists "wholly" of writings promulgating the teachings of the "religious faith."

The First Amendment of the United States Constitution provides:

> Congress shall make *no law respecting an establishment of religion*, or prohibiting the free exercise thereof . . .

This language does not contemplate that the government may nonetheless pass laws respecting an establishment of religion *so long as* government officials fairly administer the law. It is important for the continued ability of all people to worship as they choose that no state official be allowed to determine what is and what is not a religion.

I find § 151.312 unconstitutional under the establishment clause of the First Amendment for two basic reasons.[1] First, and foremost, the exemption engenders impermissible state entanglement with religion. Second, as written, § 151.312 has a constitutionally prohibited primary effect of advancing religion.

ENTANGLEMENT

The majority correctly indicates that in determining whether the entanglement engendered by state legislation is constitutionally impermissible, *i.e.*, continuing and excessive, one must look at the character and purpose of the benefited institutions, the nature of the aid, and the resulting relationship between the state and the religious entity. Here, the benefited institutions are *only* religious organizations. Furthermore, the state aid given is tax favoritism, which has been described as a subsidy. *See* Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983). The resulting relationship is by no means passive since the statute requires the Comptroller to continually examine religious periodicals and the "religious faiths" promulgating them to determine whether they meet the statutory prerequisites of consisting "wholly" of the teachings of the "religious faith." By *requiring* the Comptroller to inquire into the dogma and belief of a religious

faith, § 151.312 results in *extensive* and *impermissible* state involvement with religion.

It is irrelevant what a given employee of the Comptroller's Office testifies to how an exemption will be administered. Over the course of time many such individuals will administer and interpret the exemption. We cannot under the First Amendment allow shadowy government officials to determine what is a religious faith and what writings are true to the faith's doctrine. *See* Presbyterian Church v. Hull Church, 393 U.S. 440 (1969). Hence, unlike in Hunt v. McNair, 413 U.S. 734 (1973), the institutions regulated here are more than just permeated with a substantial religious character—they are religious organizations.

The language in the Bill of Rights was not drafted on the assumption that government will exercise power properly, but against the possible reality that the power to rule may be abused. The First Amendment does not simply prohibit the establishment of a state church or a state religion, instead it commands that there should be "no law *respecting* an establishment of religion." A given law might not *establish* a state religion but it may nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The "perception" that government is aiding religion is enough to strike a law as violating the establishment clause. *Cf.* Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216, 3226 (1985). No ongoing partnership needs to be shown.

PRIMARY EFFECT

Inherent in the First Amendment is an antagonism between the command not to establish a religion and the command not to inhibit its practice. Either religion clause if expanded to its logical extreme would tend to clash with the other. As a result of this tension, state actions must maintain an attitude of "neutrality," neither *advancing* nor *inhibiting* religion. *See* Committee for Public Education v. NyQuist, 413 U.S. 756, 788 (1973). So long as a law avoids "classifications" couched in terms of religion, either to confer a benefit or to impose a burden, the legislation will be in conformity with both religion clauses. I regard Walz v. Tax Commission, 397 U.S. 664 (1974) as standing for the proposition that in order to fulfill the intention of avoiding inhibiting the free exercise of religion by exempting religious organizations from taxes, the statute must be drafted broadly enough so as to not offend the prohibition against establishing a religion.

In *Walz*, the Supreme Court upheld the granting of property tax exemptions to churches *as part of a general exception for a wide variety of nonprofit institutions.* The challenged New York statute exempted not only all religious organizations, but also hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The breadth of the exemption indicated it had a secular purpose and provided only "incidental" aid to religion. Walz v. Tax Commission, *supra* at 673. As a consequence, *Walz* does not approve granting exemptions for church property where no similar exemptions exists for other social services or nonprofit activities. Such a

preferential exemption would almost certainly constitute a prohibited aid to certain religious entities.

Subsequent U.S. Supreme Court decisions support this view. In Gillette v. United States, 401 U.S. 437, 454 (1971), the court indicated while citing *Walz* that "under the establishment of religion clause of the First Amendment, government 'neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, *so long as an exemption is tailored broadly enough that it reflects valid secular purposes.*" (emphasis added). Likewise, in Committee for Public Education v. NyQuist, *supra* at 794, the court recalled that the exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominately of religious institutions. Hence, "the narrowness of the benefitted class would be an important factor" in any future challenges of statutory provisions under the established clause. *See also* Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230, 242 (4th Cir. 1984); Nowak, Rotunda & Young, Constitutional Law, ch. 19, § II at 1033 n. 14 (2nd ed. 1983).

By interpreting *Walz* as approving only church property tax exemptions incidental to a broader tax exception, *Walz* may thereby be reconciled with other establishment clause cases. For instance, in Board of Education v. Allen, 392 U.S. 236 (1968) and Everson v. Board of Education, 330 U.S. 1 (1947) the class of beneficiaries included *all* school children, those in public as well as those in private schools. In Tilton v. Richardson, 403 U.S. 672 (1971), federal aid was made available to *all* institutions of higher learning. To achieve the requisite neutrality required to

avoid neither "advancing" nor "inhibiting" religion, the Supreme Court has in each of the above examples upheld classifications not couched in terms of religion.

The bottom line is that any tax exemption which is drafted narrowly in terms of religion—more narrow than the New York exemption upheld in *Walz*—offends the establishment clause. Special tax benefits given only to religions cannot be squared with the principle of neutrality, and such laws have the *inevitable effect* and purpose of aiding and advancing only those benefited religious institutions. *See* Committee for Public Education v. Nyquist, *supra* at 793.

In summary, I find that § 151.312 is an unconstitutional infringement of the establishment clause of the First Amendment of the United States Constitution, applicable to the States under the Fourteenth Amendment. Since the protections under the establishment clause have been held to be fundamental, *see* Everson v. Board of Education, *supra*, laws which classify in contravention of those protections must meet strict tests of constitutionality without need to resort to the equal protection clause. Consequently, having found no compelling reasons underpinning § 151.312, I conclude the provision is unconstitutional without resorting to an equal protection analysis.

REMEDY

The Comptroller's Office takes the position that should § 151.312 be declared unconstitutional, the appropriate remedy is to sever § 151.312 from the main taxing provisions. The consequences of this proposed action would be to impose a tax on all religious periodicals.

Support for the Comptroller's argument can be found in Tex. Tax Code Ann. § 101.002 (1982 & Supp. 1986) which incorporates by reference the Code Construction Act. Section 311.032(c) of the Code Construction Act provides:

> In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute *that can be given effect without the invalid provision* or application, and to this end the provisions of the statute are severable. (emphasis added).

Tex. Gov't Code Ann. § 311.032(c) (1985). Hence, based upon § 311.032(c), this Court could sever only § 151.312 without violating the doctrine of separation of powers by imposing a tax.

Despite the technical feasibility of the Comptroller's argument, I find that the remaining taxing scheme absent § 151.312 cannot be given effect consistent with the religion clauses of the First Amendment. The equal taxation treatment suggested by the Comptroller creates a dilemma in applying the Lemon v. Kurtzman, *supra*, three-prong test. Although religious periodicals would be taxed on the same basis as other periodicals, the elimination of the exemption would under the reasoning in *Walz* result in greater entanglement in church affairs. Hence, the purpose and primary effect of the legislation absent § 151.312 would be secular, but the entanglement created in the evaluation of church property, tax foreclosures, and those confrontations which follow the taxing process would contravene the principles in *Walz*.

Had § 151.312 been drafted more broadly, my decision might be different; however, to be consistent with *Walz* and the antagonism inherent in the religion clauses, I find the taxing provision must be struck as applied to all periodicals. I would therefore overrule both points of error brought by the Comptroller and affirm the district court's judgment.

/s/ Jimmy Carroll
Justice

[Before Chief Justice Shannon, Justices Brady and Carroll]

Filed: May 27, 1987

[Publish]

FOOTNOTES

1 Although not mentioned or preserved for our review are the Texas constitutional provisions which would support Texas Monthly's position. The pertinent provisions would be:

> Article I, § 6 Freedom of Worship
>
> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its mode of public worship.
>
> Article I, § 7 Appropriations for Sectarian Purposes
>
> No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purposes.

These sections, when combined, preclude the state from establishing a religion, from aiding a particular religion, from aiding all religions, or from preferring one religion over another. A definite *wall* of separation between church and state is created. In addition, in comparison with the First Amendment of the United States Constitution, Article I, § 6 is more expansive in terms of guaranteeing protection equally of all religions, as well as the right to worship or not to worship, and Article I, § 7 contains a more specific prohibition on establishment.

A basic difference surrounds the Texas Constitution in contrast to the Federal Constitution which favors future reliance on the former. The Texas Bill of Rights is written as an affirmative grant of protections, whereas the federal constitutional language is negatively drafted as a restriction on the powers of government. Where the language of the Texas Constitution differs it is important to reevaluate the issue "to ascertain and give effect to the plain intent and language of the framers and of the people who adopted it." Gregg v. Cayuga Independent School District, 539 S.W.2d 861, 865-66 (Tex.), *appeal dismissed*, 429 U.S. 973 (1976).

There is a presumption that the language used was carefully selected, made to express the will of the people, and that in adopting it the drafters intended to give effect to every one of its provisions. Mellinger v. City of Houston, 3 S.W. 249, 252 (Tex. 1887). Therefore, structural, historical, and comparative analyses are all important. Harrington, The Texas Bill of Rights and Civil Liberties, 18 Tex. Tech. L. Rev. 1487, 1505 (1986).

The Texas constitutional provisions concerning religion, although in part declaratory of the earlier experiences of America, also reflect an immediate experience in religious intolerance suffered by Texas settlers before their independence from Mexico. At the time of the separation, the laws of Mexico made Catholicism the established religion. The Catholic church was therefore supported by governmental taxation of the citizenry as a whole. The Texas Declaration of Independence in 1836, charged that the Republic of Mexico had denied the colonists the right to worship according to the dictates of their consciences through required support of a national religion. The basic tenet of freedom of religion, which among others prompted the Texas

colonists to declare their independence, was carried forward in the language of the first Constitution of the Republic and later state constitutions in order to guard against any future encroachments. *See* Church v. Bullock, 109 S.W. 115, 117 (1908).

The rich Texas historical background consequently suggests specific constitutional protections not afforded by the United States Constitution. The language and early Texas experience clearly denote a stronger belief in the separation of church and state.

APPENDIX B

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 14,692

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,

APPELLANTS

vs.

TEXAS MONTHLY, INC.,

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT, NO. 378,384, HONORABLE JOE B. DIBRELL, JR., JUDGE

Appellee, Texas Monthly, Inc., sued the Comptroller of Public Accounts and others in the district court of Travis County seeking recovery of sales taxes paid under protest. After trial to the court, the district court rendered judgment that Texas Monthly recover $149,107.74. This Court will reverse the judgment.

Texas Monthly publishes a general interest magazine on a monthly basis. Effective October 2, 1984, the sales of its magazine became subject to the sales tax. Tex. Tax Code Ann. § 151.051 (Supp. 1982). Texas Monthly paid, under protest $149,107.74 which sum represented the tax on the sale of its magazine between January 21, 1985 and December 18, 1985.

Texas Monthly's suit for refund was predicated upon the fact that certain publications are exempted from payment of the sales tax. Tex. Tax Code Ann. § 151.312. That section provides:

> Periodicals that are published, or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religion or religious faith are exempted from the taxes imposed by this Chapter.

In its trial petition, Texas Mont'ly pleaded that:

> Section 151.312 exempts from the sales tax religious periodicals. Such an exemption constitutes an unlawful discrimination based on the content of a publication and thus violates Plaintiff's rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article 1, § 8 of the Constitution of Texas.

The district court's judgment declared § 151.312 unconstitutional "because it constitutes an unlawful discrimination based on the content of [Texas Monthly's] publication in violation of its rights under the First and Fourteenth Amendments of the U.S. Constitution and Article VIII § 1 of the Texas Constitution . . . .

Although the trial petition and the judgment are not entirely clear, the Comptroller and Texas Monthly in their briefs and oral argument took the position that the district court's judgment was grounded upon the premise that the § 151.312 exemption violated the equal protection and free speech clauses of the First and Fourteenth Amendments to the Constitution of the United States and the equal and uniform clause of Article VIII § 1 of the Constitution of Texas. In its brief, Texas Monthly dis-

cusses the establishment clause of the First Amendment but only as a part of its equal protection analysis.

Under point of error one, the Comptroller first asserts that the district court erred in concluding that § 151.312 violated the equal protection clause of the United States Constitution and the equal and uniform clause of the Texas Constitution. We agree.

It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Equal protection does not impose on a state any rigid equality of taxation. Inequalities which result from singling out one particular class for taxation or exemption infringe no constitutional limitation. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1936). Like considerations govern exemptions from the operation of a tax imposed on the members of a class. The legislature is not bound to tax every member of a class or none at all. The legislature may make rational distinctions of degree having a rational basis. Carmichael v. Southern Coal & Coke Co., *supra;* Hurt v. Cooper, 110 S.W.2d 896 (Tex. 1937); American Transfer & Storage Co. v. Bullock, 525 S.W.2d 918 (Tex. Civ. App. 1975, writ ref'd). The exemptions, when subjected to judicial scrutiny, must be presumed to rest on a rational basis if any state of facts would support such basis. Carmichael v. Southern Coal & Coke Co., *supra.* Indeed, it is said that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." Madden v. Kentucky, 309 U.S. 83 (1940).

In its effort to meet this burden, Texas Monthly suggests that the § 151.312 exemption constitutes a law "respecting an establishment of religion," in violation of the United States Constitution,[1] and therefore is unsupported by any legitimate basis.

The United States Supreme Court has created a three-part test to aid in determining whether a statute violates the establishment clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). "Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." Walz v. Tax Commission, 397 U.S. 664, 669 (1970). Applying this criteria, this Court concludes that § 151.312 does not violate the establishment clause. Furthermore, we are of the view that the classification established by this tax exemption has a rational basis and, accordingly, does not deny appellee equal protection of the law.

The secular purpose served by a tax exemption for religious organizations was described in *Walz, supra.* In *Walz* the Supreme Court reasoned that such a tax exemption "restricts the fiscal relationship between church and

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[1] United States Const. amend. I states in part: "Congress shall make no law respecting an establishment of religion . . . ."

state, and tends to complement and reinforce *the desired separation insulating each from the other.*" *Id.* at 676 (emphasis supplied).

Furthermore, the opinion in *Walz* demonstrates that the tax exemption at issue does not have the primary effect of advancing or inhibiting religion. To the contrary, the effect of religious tax exemptions such as § 151.312 is to permit religious organizations to be independent of government support or sanction. Although *Walz* recognized that "[g]ranting tax exemptions to churches necessarily operates to afford [them] an indirect economic benefit," the Court concluded that

> [t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into the arms of the state . . . .

Id. at 674-75.

Nor does the fact that *Walz* involved an exemption granted to other "nonprofit, quasi-public corporations," as well as to religious groups, distinguish it from this appeal. Although the broader based exemption in *Walz* provided a clearer case of non-sponsorship than is here present, the *neutrality* toward religion effected by the grant of an exemption for religious periodicals is just as evident. To discover an advancement of religion in this statutory scheme is to turn the intent and effect of § 151.312 on its head.

Finally, this Court concludes that § 151.312 does not excessively entangle the state in religious activities and,

accordingly, the statute meets the third prong of the *Lemon v. Kurtzman* test. Once again, we refer to *Walz* as authority for our view. In *Walz* the Court noted that, generally, the grant of an exemption to religious organizations leads to lesser involvement by the State than does taxation. Nevertheless, "[i]n analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675. This analysis involves examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship beween the government and the religious authority." *Lemon, supra* at 615.

To the extent § 151.312 creates entanglement, it creates entanglement between government and institutions with purely religious purposes. We are not faced, therefore, with the difficulties presented when the government attempts to limit its intrusion to the secular endeavors of a religious organization—for example, where government attempts to provide aid for the non-religious curriculum of sectarian schools and yet creates excessive entanglement by oversight measures intended to insure that the aid is not directed to religious purposes. *See Lemon, supra;* Meek v. Pittenger, 421 U.S. 349, 372 (1975). Accordingly, our focus is on the nature of the State's aid and the relationship between the State and religious publishers that results from the aid.

The aid at issue is, of course, the indirect subsidy provided by the tax exemption to religious periodicals. No

affirmative action by state government is necessary to bestow this benefit. Due to its passive nature, the tax exemption does not create the appearance of an ongoing partnership between the State and religion presented by direct aid. More important, the exemption is administered in such a manner that "official and continuing surveillance" by the government is avoided.

Wanda Hutcheson, supervisor for sales tax policy in the Comptroller's Office, testified that religious publishers may qualify for an exemption by making a one-time showing that they are a bona fide religious organization under Texas Tax Code § 151.310. Hutcheson further testified that "we leave it to [the organization] to decide whether or not it's . . . a publication that teaches their faith."

The Comptroller's application of § 151.312 in no manner resembles the "comprehensive, discriminating, and continuing state surveillance" which confronted the Supreme Court in *Lemon*. *Id.* at 619. In *Lemon*, the State had conditioned its direct aid to nonpublic schools with "pervasive" restrictions and a continuing right to inspect and audit school records. In contrast, our record demonstrates that the exemption is administered with a minimum of church-state entanglement and with an eye toward the goal of state neutrality codified in § 151.312 and elaborated in *Walz*.

Because the record in this appeal reveals "no realistic likelihood" that § 151.312 is enforced in such a way as to allow impermissible entanglement, this Court concludes that the Comptroller has met the third prong of the *Lemon* test. *See* Hunt v. McNair, 413 U.S. 734, 747-78

(1973) (statute was constitutional where administrative scheme negated possibility that breadth of statute would lead to excessive entanglement).

The policy of neutrality toward religion embodied in § 151.312 provides a rational basis for the exemption and defeats any claim that the exemption violates the establishment clause. Accordingly, we conclude that § 151.312 does not deny appellee equal protection of the laws.

Also under its first point of error, the Comptroller asserts that the district court erred in concluding that the § 151.312 exemption violated the free speech clause of the First Amendment. We agree.

This issue is controlled by the holding of the United States Supreme Court in Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983). *Regan* involved the validity of Internal Revenue Code Provisions which allowed contributions to tax exempt organizations to be tax deductible only if the organization did not engage in lobbying. Taxation With Representation claimed the denial of this tax benefit was an "unconstitutional condition" on its exercise of free speech through lobbying. The Supreme Court rejected this claim, stating that "[t]his Court has never held that Congress must *grant a benefit* such as [Taxation With Representation] claims here to a person who wishes to exercise a constitutional right." *Id.* at 545 (emphasis supplied). In short, the Supreme Court held that the failure of the State to *subsidize* speech does not significantly interefere with First Amendment rights.

The same logic applies to § 151.312 of the Tax Code. The legislature has chosen to grant a tax benefit to re-

ligious publications. However, Texas Monthly has not shown that the legislature's failure to grant this benefit to other types of publications has "coerced" them into restricting their right of free speech. *Cf.* Speiser v. Randall, 357 U.S. 513 (1958). The first point of error is sustained.

In its prayer for relief, Texas Monthly, of course, asked that this Court affirm the district court's judgment. If, however, this Court concluded that the district court erred respecting § 151.312, Texas Monthly then requested that we remand the cause to district court for its consideration of issues raised but not there determined.

It is true that Texas Monthly pleaded that it was entitled to recovery of the taxes based upon one of several grounds. It is likewise true that the district court predicated its judgment upon only one such ground—the claimed unconstitutionality of § 151.312. Texas Monthly, however, did not complain in district court of the court's failure to consider and pass on its other asserted grounds of recovery, nor did it assert any such complaints by cross-points in this Court. Accordingly, Texas Monthly waived any right it may have had to require the district court to consider and pass on its other ground of recovery. State Bar of Texas, Appellate Procedure in Texas § 15.16 at 351 (2nd ed. 1979).

The judgment of the district court is reversed and judgment is here rendered that Texas Monthly take nothing.

/s/ Bob Shannon
Chief Justice

[Before Chief Justice Shannon, Justices Brady and Carroll]

Reversed and Rendered

Filed: March 18, 1987

[Publish]

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 14,692

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,

APPELLANTS

vs.

TEXAS MONTHLY, INC.

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT, NO. 378,384, HONORABLE JOE B. DIBRELL, JR., JUDGE

DISSENTING OPINION

I respectfully dissent. I am particularly troubled by the impermissible intrusion of the State into religious affairs mandated by the *express terms* of § 151.312. Before allowing an exemption under § 151.312, the Comptroller must not only determine whether a bona fide "religious faith" is distributing the periodical, he must also assess whether the publication consists "wholly" of writings promulgating the teachings of the "religious faith."

The First Amendment of the United States Constitution provides:

> **Congress shall make *no law respecting an establishment of religion,* or prohibiting the free exercise thereof . . .**

This language does not contemplate that the government may nonetheless pass laws respecting an establishment of religion *so long as* government officials fairly administer the law. It is important for the continued ability of all people to worship as they choose that no state official be allowed to determine what is and what is not a religion.

I find § 151.312 unconstitutional under the establishment clause of the First Amendment for two basic reasons.[1] First, and foremost, the exemption engenders impermissible state entanglement with religion. Second, as written, § 151.312 has a constitutionally prohibited primary effect of advancing religion.

ENTANGLEMENT

The majority correctly indicates that in determining whether the entanglement engendered by state legislation is constitutionally impermissible, *i.e.*, continuing and excessive, one must look at the character and purpose of the benefited institutions, the nature of the aid, and the resulting relationship between the state and the religious entity. Here, the benefited institutions are *only* religious organizations. Furthermore, the state aid given is tax favoritism, which has been described as a subsidy. *See* Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983). The resulting relationship is by no means passive since the statute requires the Comptroller to con-

tinually examine religious periodicals and the "religious faiths" promulgating them to determine whether they meet the statutory prerequisites of consisting "wholly" of the teachings of the "religious faith." By *requiring* the Comptroller to inquire into the dogma and belief of a religious faith, § 151.312 results in *extensive* and *impermissible* state involvement with religion.

It is irrelevant what a given employee of the Comptroller's Office testifies to how an exemption will be administered. Over the course of time many such individuals will administer and interpret the exemption. We cannot under the First Amendment allow shadowy government officials to determine what is a religious faith and what writings are true to the faith's doctrine. *See* Presbyterian Church v. Hull Church, 393 U.S. 440 (1969). Hence, unlike in Hunt v. McNair, 413 U.S. 734 (1973), the institutions regulated here are more than just permeated with a substantial religious character—they are religious organizations.

The language in the Bill of Rights was not drafted on the assumption that government will exercise power properly, but against the possible reality that the power to rule may be abused. The First Amendment does not simply prohibit the establishment of a state church or a state religion, instead it commands that there should be "no law *respecting* an establishment of religion." A given law might not *establish* a state religion but it may nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The "perception" that government is aiding

religion is enough to strike a law as violating the establishment clause. *Cf.* Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216, 3226 (1985). No ongoing partnership needs to be shown.

PRIMARY EFFECT

Inherent in the First Amendment is an antagonism between the command not to establish a religion and the command not to inhibit its practice. Either religion clause if expanded to its logical extreme would tend to clash with the other. As a result of this tension, state actions must maintain an attitude of "neutrality," neither *advancing* nor *inhibiting* religion. *See* Committee for Public Education v. NyQuist, 413 U.S. 756, 788 (1973). So long as a law avoids "classifications" couched in terms of religion, either to confer a benefit or to impose a burden, the legislation will be in conformity with both religion clauses. I regard Walz v. Tax Commission, 397 U.S. 664 (1974) as standing for the proposition that in order to fulfill the intention of avoiding inhibiting the free exercise of religion by exempting religious organizations from taxes, the statute must be drafted broadly enough so as to not offend the prohibition against establishing a religion.

In *Walz*, the Supreme Court upheld the granting of property tax exemptions to churches *as part of a general exception for a wide variety of nonprofit institutions.* The challenged New York statute exempted not only all religious organizations, but also hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The breadth of the exemption indicated it had a secular purpose and provided only "incidental" aid to

religion. Walz v. Tax Commission, *supra* at 673. As a consequence, *Walz* does not approve granting exemptions for church property where no similar exemptions exists for other social services or nonprofit activities. Such a preferential exemption would almost certainly constitute a prohibited aid to certain religious entities.

Subsequent U.S. Supreme Court decisions support this view. In Gillette v. United States, 401 U.S. 437, 454 (1971), the court indicated while citing *Walz* that "under the establishment of religion clause of the First Amendment, government 'neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, *so long as an exemption is tailored broadly enough that it reflects valid secular purposes.*" (emphasis added). Likewise, in Committee for Public Education v. NyQuist, *supra* at 794, the court recalled that the exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominately of religious institutions. Hence, "the narrowness of the benefitted class would be an important factor" in any future challenges of statutory provisions under the established clause. *See also* Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230, 242 (4th Cir. 1984); Nowak, Rotunda & Young, Constitutional Law, ch. 19, § II at 1033 n. 14 (2nd ed. 1983).

By interpreting *Walz* as approving only church property tax exemptions incidental to a broader tax exception, *Walz* may thereby be reconciled with other establishment clause cases. For instance, in Board of Education v. Allen, 392 U.S. 236 (1968) and Everson v. Board of Education, 330 U.S. 1 (1947) the class of beneficiaries included

all school children, those in public as well as those in private schools. In Tilton v. Richardson, 403 U.S. 672 (1971), federal aid was made available to *all* institutions of higher learning. To achieve the requisite neutrality required to avoid neither "advancing" nor "inhibiting" religion, the Supreme Court has in each of the above examples upheld classifications not couched in terms of religion.

The bottom line is that any tax exemption which is drafted narrowly in terms of religion—more narrow than the New York exemption upheld in *Walz*—offends the establishment clause. Special tax benefits given only to religions cannot be squared with the principle of neutrality, and such laws have the *inevitable effect* and purpose of aiding and advancing only those benefited religious institutions. *See* Committee for Public Education v. Nyquist, *supra* at 793.

In summary, I find that § 151.312 is an unconstitutional infringement of the establishment clause of the First Amendment of the United States Constitution, applicable to the States under the Fourteenth Amendment. Since the protections under the establishment clause have been held to be fundamental, *see* Everson v. Board of Education, *supra*, laws which classify in contravention of those protections must meet strict tests of constitutionality without need to resort to the equal protection clause. Consequently, having found no compelling reasons underpinning § 151.312, I conclude the provision is unconstitutional without resorting to an equal protection analysis.

REMEDY

The Comptroller's Office takes the position that should § 151.312 be declared unconstitutional, the appropriate

remedy is to sever § 151.312 from the main taxing provisions. The consequences of this proposed action would be to impose a tax on all religious periodicals.

Support for the Comptroller's argument can be found in Tex. Tax Code Ann. § 101.002 (1982 & Supp. 1986) which incorporates by reference the Code Construction Act. Section 311.032(c) of the Code Construction Act provides:

> In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not effect other provisions or applications of the statute *that can be given effect without the invalid provision* or application, and to this end the provisions of the statute are severable. (emphasis added).

Tex. Gov.'t Code Ann. § 311.032(c) (1985). Hence, based upon § 311.032(c), this Court could sever only § 151.312 without violating the doctrine of separation of powers by imposing a tax.

Despite the technical feasibility of the Comptroller's argument, I find that the remaining taxing scheme absent § 151.312 cannot be given effect consistent with the religion clauses of the First Amendment. The equal taxation treatment suggested by the Comptroller creates a dilemma in applying the Lemon v. Kurtzman, *supra*, three-prong test. Although religious periodicals would be taxed on the same basis as other periodicals, the elimination of the exemption would under the reasoning in *Walz* result in greater entanglement in church affairs. Hence, the purpose and primary effect of the legislation absent § 151.312 would be secular, but the entanglement created in the evaluation of

church property, tax foreclosures, and those confrontations which follow the taxing process would contravene the principles in Walz.

Had §151.312 been drafted more broadly, my decision might be different; however, to be consistent with *Walz* and the antagonism inherent in the religion clauses, I find the taxing provision must be struck as applied to all periodicals. I would therefore overrule both points of error brought by the Comptroller and affirm the district court's judgment.

Jimmy Carroll, Justice

[Before Chief Justice Shannon, Justices Brady and Carroll]
Filed: March 18, 1987
[Publish]

FOOTNOTES

[1] Although not mentioned or preserved for our review are the Texas constitutional provisions which would support Texas Monthly's position. The pertinent provisions would be:

> Article I, § 6 Freedom of Worship
>
> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its mode of public worship.
>
> Article I, § 7 Appropriations for Sectarian Purposes
>
> No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society,

(Continued on next page)

(Continued from previous page)

theological or religious seminary; nor shall property belonging to the state be appropriated for any such purposes.

These sections, when combined, preclude the state from establishing a religion, from aiding a particular religion, from aiding all religions, or from preferring one religion over another. A definite *wall* of separation between church and state is created. In addition, in comparison with the First Amendment of the United States Constitution, Article I, § 6 is more expansive in terms of guaranteeing protection equally of all religions, as well as the right to worship or not to worship, and Article I, § 7 contains a more specific prohibition on establishment.

A basic difference surrounds the Texas Constitution in contrast to the Federal Constitution which favors future reliance on the former. The Texas Bill of Rights is written as an affirmative grant of protections, whereas the federal constitutional language is negatively drafted as a restriction on the powers of government. Where the language of the Texas Constitution differs it is important to reevaluate the issue "to ascertain and give effect to the plain intent and language of the framers and of the people who adopted it." Gregg v. Cayuga Independent School District, 539 S.W.2d 861, 865-66 (Tex.), *appeal dismissed*, 429 U.S. 973 (1976).

There is a presumption that the language used was carefully selected, made to express the will of the people, and that in adopting it the drafters intended to give effect to every one of its provisions. Mellinger v. City of Houston, 3 S.W. 249, 252 (Tex. 1887). Therefore, structural, historical, and comparative analyses are all important. Harrington, The Texas Bill of Rights and Civil Liberties, 18 Tex. Tech. L. Rev. 1487, 1505 (1986).

The Texas constitutional provisions concerning religion, although in part declaratory of the earlier experiences of America, also reflect an immediate experience in religious intolerance suffered by Texas settlers before their independence from Mexico. At the time of the separation, the laws of Mexico made Catholicism the established religion. The Catholic church was therefore supported by governmental taxation of the citizenry as a whole. The Texas Declaration of Independence in 1836, charged that the Republic of Mexico had denied the colonists the right to worship according to the dictates of their consciences through required sup-

(Continued on next page)

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port of a national religion. The basic tenet of freedom of religion, which among others prompted the Texas colonists to declare their independence, was carried forward in the language of the first Constitution of the Republic and later state constitutions in order to guard against any future encroachments. *See* Church v. Bullock, 109 S.W. 115, 117 (1908).

The rich Texas historical background consequently suggests specific constitutional protections not afforded by the United States Constitution. The language and early Texas experience clearly denote a stronger belief in the separation of church and state.

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED MARCH 18, 1987

14,692—BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS V. TEXAS MONTHLY, INC. APPEAL FROM 345TH DISTRICT COURT OF TRAVIS COUNTY

Before Chief Justice Shannon, Justices Brady and Carroll

REVERSED AND RENDERED—Opinion by Chief Justice Shannon; Dissenting opinion by Justice Carroll

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the trial court's judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the trial court be and is hereby reversed, and judgment be and is hereby rendered that appellee, Texas Monthly, Inc., take nothing. It is **FURTHER** ordered that appellee, Texas Monthly, Inc., pay all costs in this behalf expended both in this Court and the court below and that this decision be certified below for observance.

APPENDIX C

NO. 378,384

TEXAS MONTHLY, INC. Plaintiff	)	IN THE DISTRICT COURT OF TRAVIS
VS.	)	COUNTY, TEXAS
STATE OF TEXAS, BOB BULLOCK COMPTROLLER OF PUBLIC OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS Defendants	)	345TH JUDICIAL DISTRICT

FINAL JUDGMENT

BE IT REMEMBERED that on the 3rd and 4th days of February, 1986, the above-styled and numbered cause came on for trial on the merits, all parties having due prior notice of such setting.

The parties announced ready for trial through their respective attorneys of record, whereupon the Court proceeded with the trial of the merits before the Court. After examining the pleadings and considering the evidence, the trial briefs, and arguments of counsel, the Court finds that TEX. TAX CODE ANN. § 151.312 is unconstitutional because it constitutes an unlawful discrimination based on the content of Plaintiff's publication in violation of its rights under the First and Fourteenth Amendments of the U.S. Constitution and Article VIII § 1 of the Texas Con-

stitution, that Plaintiff is entitled to the relief prayed for in its Second Amended Original Petition, that the sum of One Hundred Forty-Nine Thousand One Hundred Seven and 74/100 Dollars ($149,107.74) paid by Plaintiff under protest pursuant to § 112.051, TEX. TAX CODE ANN., belongs to Plaintiff and was unlawfully demanded by Defendants.

It is therefore, ORDERED, ADJUDGED and DECREED that Texas Monthly, Inc. have and recover from the State of Texas the sum of One Hundred Forty-Nine Thousand One Hundred Seven and 74/100 Dollars ($149,107.74), plus interest as provided in § 112.058, TEX. TAX CODE ANN., from the date such sum was paid under protest until refunded.

It is further ORDERED, ADJUDGED and DECREED that it is the duty of the State Treasurer of Texas to refund such sum of One Hundred Forty-Nine Thousand One Hundred Seven and 74/100 Dollars ($149, 107.74), together with the pro-rata interest earned thereon, to Texas Monthly, Inc. by the issuance of refund warrants to be written and signed by the Comptroller of Public Accounts of the State of Texas and counter-signed by the Treasurer of the State of Texas, and charged against the suspense account as provided in § 112.060, TEX. TAX CODE ANN., such warrants to be delivered by the Comptroller of Public Accounts to Plaintiff, and Defendants are accordingly ORDERED to take all such action as is necessary and appropriate to accomplish such refund and the issuance and delivery of such refund warrants to Texas Monthly, Inc. in compliance with this judgment.

It is further ORDERED, ADJUDGED and DECREED that all costs of Court are adjudged against Defendants herein. All writs and processes for the enforcement and collection of this judgment or the costs of Court may issue as necessary.

Since the Court has concluded that because the legislature has exempted periodicals described in Section 151.312 from the tax and not exempted Plaintiff's periodical, collection of the tax from Plaintiff violated the Constitutions of the United States and Texas. It is therefore unnecessary for it to make findings of facts and conclusions of law on the other issues raised by Plaintiff's pleadings and none are made.

SIGNED this 12th day of February, 1986.

/s/ Joe B. Dibrell, Jr.
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

GRAVES, DOUGHERTY, HEARON & MOODY
2300 InterFirst Tower
P.O. Box 98
Austin, Texas 78767
512/480-5600

By: /s/ R. James George, Jr.
State Bar ID #07810000

ATTORNEYS FOR PLAINTIFF

JIM MATTOX,
Attorney General of Texas

MARY KELLER,
Executive Assistant

HARRIET D. BURKE,
Assistant Attorney General,
Chief, Taxation Division
P.O. Box 12548
Austin, Texas 78711
512/475-1013

By: /s/ David Mendez
State Bar ID #13932575

ATTORNEYS FOR DEFENDANTS

APPENDIX D

NO. 378,384

TEXAS MONTHLY, INC.,	)	IN THE
	)	DISTRICT
Plaintiff,	)	COURT OF
	)	TRAVIS
	)	COUNTY,
VS.	)	TEXAS
	)	
STATE OF TEXAS, BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL,	)	
	)	
	)	345TH
	)	JUDICIAL
	)	DISTRICT
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BE IT REMEMBERED that on the 12th day of February, 1986, judgment was rendered in the above-styled and numbered action for Plaintiff. On February 18, 1986, Defendants filed Request for Findings of Fact and Conclusions of Law, and on the 21st day of March, 1986, filed a Reminder to File Findings of Fact and Conclusions of Law. The Court therefore makes the following Findings of Fact:

FINDINGS OF FACT

1. There are periodicals that qualify under the language in Section 151.312, Texas Tax Code, as religious publications which are regularly circulated in Texas and which would be subject to the sales and use tax but for the application of Section 151.312.

2. There is no basis for the exemption of such religious periodicals other than the promotion of religion itself, a prohibited reason.

3. The determination of which periodical meets the test set out in Section 151.312 requires an analysis of the contents of the writing itself and no decision can be made under the statutory language except by an analysis of the writing.

CONCLUSIONS OF LAW

1. The exemption of religious periodicals pursuant to Section 151.312 of the Texas Tax Code violates the First and Fourteenth Amendments of the Constitution of the United States and Article I, § 8 of the Constitution of Texas.

2. This Court is without power to rewrite the statute to make religious periodicals subject to tax and therefore its only remedy is to prevent the collection of taxes from other peridocals until the legislature determines that religious periodicals described in Section 151.312 should be subject to the same tax.

ENTERED this 11 day of April, 1986.

/s/ Joe B. Dibrell, Jr.,
HONORABLE JOE B. DIBRELL,
JR., JUDGE PRESIDING

APPENDIX E

(SEAL)

COURT OF APPEALS.

Third Supreme Judicial District.

P.O. Box 12547, Capitol Station, Austin, Texas 78711
(512) 463-1733

May 27, 1987

Bob Shannon, Chief Justice
John Powers, Justice
Jim Brady, Justice
Bob Gammage, Justice
Jimmy Carroll, Justice
Marilyn Aboussie, Justice

Susan K. Bage, Clerk

Patrick Shannon
Chief Staff Attorney

Honorable Jim Mattox
Attorney General

Honorable Harriet D. Burke
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711

Mr. R. James George, Jr.
Graves, Dougherty, Hearon & Moody
P. O. Box 98
Austin, Texas 78767

Re: No. 14,692—Bob Bullock, Comptroller of Public Accounts of The State of Texas, Jim Mattox, Attorney General of The State of Texas and Ann Richards, Treasurer of The State of Texas v. Texas Monthly, Inc.

Counsel:

Please be advised that appellee's motion for rehearing in the above cause was this day submitted and overruled; former opinion withdrawn and reversed and rendered on motion for rehearing—written opinion.

A copy of this Court's opinion, along with the dissenting opinion by Justice Carroll, are enclosed, in accordance with Rule 91, Tex. R. App. P.

Very truly yours,

SUSAN K. BAGE, CLERK

By: /s/ Ora Aranda
Ora Aranda, Deputy

Encl.

xc: Honorable Joe B. Dibrell, District Judge
Mr. John Dickson, District Clerk

APPENDIX F

(SEAL)

OFFICIAL NOTICE FROM
THIRD COURT OF APPEALS

RE: No. 14,692—Bob Bullock, Comptroller
of Public Accounts of the State of
Texas, et al. v. Texas Monthly, Inc.

May 6, 1987

You are hereby notified that appellee's motion for rehearing en banc was this day submitted and overruled.

Susan K. Bage, Clerk

Third Court of Appeals
P.O. Box 12547
Austin, Texas 78711

Mail to: Mr. R. James George, Jr.
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
P. O. Box 98
Austin, Texas 78767

APPENDIX G

(SEAL)

OFFICIAL NOTICE FROM THIRD COURT OF APPEALS

RE: No. 14,692—Bob Bullock
Comptroller of Public Accounts of the
State of Texas, et al. v. Texas Monthly, Inc.

June 24, 1987

You are hereby notified that appellee's second motion for rehearing was this day submitted and overruled.

Susan K. Bage, Clerk

Third Court of Appeals
P.O. Box 12547
Austin, Texas 78711

Mail to: Mr. R. James George, Jr.
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
P. O. Box 98
Austin, Texas 78767

APPENDIX H

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 23, 1987

Mr. R. James George, Jr.
Graves, Dougherty, Hearon & Moody
P. O. Box 98
Austin, TX 78767

Ms. Harriet D. Burke
Office of the Attorney General of Texas
Jim Mattox, A. G.
P. O. Box 12548 Capitol Station
Austin, TX 78711

Re: Case No. C-6650

STYLE: TEXAS MONTHLY, INC.
v. BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS OF THE STATE OF

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ Blanca E. Morin
Deputy

APPENDIX I

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

October 28, 1987

Mr. R. James George, Jr.
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
Austin TX 78701

Ms. Pamela Stanton Baron
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
Austin TX 78701

Ms. Harriet D. Burke
Office of the Attorney General of Texas
Jim Mattox, A. G.
P.O. Box 12548 Capitol Station
Austin TX 78711

RE: Case No. C-6650

STYLE: TEXAS MONTHLY, INC. v. BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ Blanca E. Morin
Deputy

APPENDIX J

No. 14,692

IN THE COURT OF APPEALS FOR THE
THIRD SUPREME JUDICIAL DISTRICT
AT AUSTIN, TEXAS

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,

Appellants,

vs.

TEXAS MONTHLY, INC.,

Appellee.

Appeal from the 345th Judicial District Court of
Travis County, Texas

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE COURT OF APPEALS:

Notice is hereby given that Texas Monthly, Inc. hereby appeals to the Supreme Court of the United States from the final judgment on motion for rehearing of this Court of May 27, 1987, reversing the judgment of the district court and upholding, against constitutional challange, the state sales tax imposed on sales of a general interest magazine published by Texas Monthly. The Supreme Court of Texas refused, no reversible error, Texas Monthly's application for writ of error on September 23, 1987 and overruled Texas Monthly's motion for rehearing on application for writ of error on October 28, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Date: December 3, 1987.

Respectfully submitted,
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
Austin, Texas 78701
512/480-5600

By: /s/ R. James George, Jr.
SBN 07810000
John M. Harmon
SBN 09020775
Pamela Stanton Baron
SBN 01797100

Attorneys for Texas Monthly, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Appeal was served on Jim Mattox, Mary Keller and Harriet D. Burke, Attorneys for Bob Bullock, Comptroller of Public Accounts of the State of Texas, Jim Mattox, Attorney General of Texas, and Ann Richards, Treasurer of the State of Texas, at 210 Barton Springs Road, 4th Floor Jamail Building, Austin, Texas, by hand delivery this 3rd day of December, 1987.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

/s/ R. James George, Jr.
Attorney for Texas Monthly, Inc.

Graves, Dougherty, Hearon & Moody
2300 FirstRepublic Bank Tower
Austin, Texas 78701
512/480-5600

APPENDIX K

§ 151.312. *Religious Periodicals and Writings*

Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith are exempted from the taxes imposed by this chapter.

APPENDIX L

§ 151.310. *Religious, Educational, and Public Service Organizations*

(a) A taxable item sold, leased, or rented to, or stored, used, or consumed by, any of the following organizations is exempted from the taxes imposed by this chapter:

(1) an organization created for religious, educational, or charitable purposes if no part of the net earnings of the organization benefits a private shareholder or individual and the items purchased are related to the purpose of the organization;

(2) an organization qualifying for an exemption from federal income taxes under Section 501(c)(3), (4), (8), (10), or (19), Internal Revenue Code, of the item sold, leased, rented, stored, used, or consumed relates to the purpose of the exempted organization and the item is not used for the personal benefit of a private stockholder or individual;

(3) a nonprofit organization engaged exclusively in providing athletic competition among persons under 19 years old if no financial benefit goes to an individual or shareholder;

(4) a company, department, or association organized for the purpose of answering fire alarms and extinguishing fires or for the purpose of answering fire alarms, extinguishing fires, and providing emergency medical services, the members of which receive no compensation or only nominal compensation for their services rendered, if the taxable item is used exclusively by the company, department, or association; or

(5) a chamber of commerce or a convention and tourist promotional agency representing at least one Texas city or county if the chamber of commerce or the agency is not organized for profit and no part

of its net earnings inures to a private shareholder or other individual.

(b) The sale of, or contracting for the sale of, concessions at an event conducted by an organization exempted under Subsection (a)(3) of this section does not prevent the application of the exemption to that organization.

(c) An organization that qualifies for an exemption under Subsection (a)(1) of this section may hold one tax-free sale or auction during a calendar year and the tax-free sale or auction may continue for one day only. The sale of a taxable item by a qualified organization at a tax-free sale or auction is exempted from the sales tax imposed by Subchapter C of this chapter. The storage, use, or consumption of a taxable item acquired from a qualified organization at a tax-free sale or auction is exempted from the use tax imposed by Subchapter D of this chapter until the item is resold or subsequently transferred.

(d) If two or more organizations jointly hold a tax-free sale or auction, neither organization may hold another tax-free sale or auction during the calendar year. The employment of and payment of a reasonable fee to an auctioneer to conduct a tax-free auction does not disqualify an otherwise qualified organization from receiving the exemption provided by Subsection (c) of this section.

APPENDIX M

34 Tex. Admin. Code § 3.299(d) provides:

> *Sacred writings.* The receipts from the sale or use in this state of books consisting wholly of writings sacred to any religious faith, and religious periodicals published or distributed by any religious faith consisting wholly of writings promulgating the teaching of such faith, or audio-electronic transcriptions of this material, are exempt from the sales tax. The exemption for publications and books sacred to a particular faith does not extend to sheet music and films.